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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 483

PEKAO TRADING CORPORATION,
Appellant,

against

GEORGE M. BRAGALINI, IRA J. PALESTIN and FREDERICK R. CLARK, constituting the State Tax Commission of the State of New York,
Respondents.

Appeal from the Court of Appeals of the State of New York

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question and should exercise such jurisdiction in this case.

Opinion Below

The Court of Appeals of the State of New York affirmed the opinion of the Appellate Division, Third Judicial Department of the State of New York, without opinion, two of the Judges dissenting. Its decision with the opinion of the two dissenting Judges is reported at 8 N. Y. (2d) 903. The opinion of the Appellate Division, Third Judicial Department, appears at 9 App. Div. (2d) 559. Copies of the said decisions and opinions are annexed to this statement as Appendix A and B, respectively.

Jurisdiction

This proceeding was brought pursuant to Article 78 of the Civil Practice Act of the State of New York and Section 215 of the New York State Tax Law to review a determination of the New York State Tax Commission assessing a franchise tax against the appellant for the year 1954, ruling that its activities during that year constituted the doing of business in New York State so as to subject it to the tax imposed by Article 9A of the New York State Tax Law.

The order sought to be reviewed was made and entered on July 7, 1960, and is on file with the Clerk of the Supreme Court of the State of New York, Albany County. The notice of appeal was filed with the clerk of said court on September 15, 1960.

The jurisdiction of this Court is conferred pursuant to 28 U. S. C. Section 1257(2).

The cases believed to sustain the jurisdiction of this Court on direct appeal are:

Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282;
Fiske v. *Kansas*, 274 U. S. 380;
James Stewart & Co. v. *Sadrakula, Administratrix*, 309 U. S. 94;
Central Greyhound Lines Inc. v. *Mealy*, 334 U. S. 653.

The statute and regulation involved in this proceeding is Section 209(1) of the New York State Tax Law, and Article 141 of the regulations of the New York State Tax Commission.

Section 209(1) reads as follows:

> "For the privilege of exercising its franchise or doing business in this state in a corporate or organized capacity for all or any part of each of

its fiscal or calendar years beginning after November first, nineteen hundred forty-four, * * * every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax, to be computed by the tax commission upon the basis of its entire net income, or upon such other basis as may be applicable as hereinafter provided, for such fiscal or calendar year or part thereof, * * *."

Article 141 reads as follows:

"A foreign corporation, the business of which is wholly interstate commerce, may do business in New York without becoming subject to the tax. But a foreign corporation, the business of which is partly interstate commerce and partly local business, is subject to the franchise tax imposed for the privilege of doing business in New York, and such tax, when measured by entire net income, is measured by all of its entire net income, including that derived from interstate commerce."

Questions Presented

Was the appellant engaged exclusively in foreign commerce; and, if so, are its activities in New York State so indivisibly involved in foreign commerce that the imposition of the New York State franchise tax for the privilege of doing business in New York is in violation of the Interstate Commerce Clause (Article I, Section 8) of the United States Constitution.

Statement of the Case

The facts material to the consideration of the questions presented on this appeal are as follows:

Appellant is and at all relevant times was a Delaware corporation duly qualified in the State of New York, having its principal office in the State of New York at 25 Broad Street, New York City, and maintaining a statutory

office in Delaware. Appellant is engaged in the sale of gift parcels to persons in the United States for delivery to persons in Poland. The goods with which the appellant deals are not transported from the United States to Poland. They originate in Poland, they are stockpiled there, and they are delivered to the ultimate recipient in Poland.

Sales are made both directly to retail customers and at wholesale to persons authorized to act as dealers. The direct purchaser receives a receipt from Pekao, which constitutes the contract of sale and which requires delivery of the purchased parcel to the recipient in Poland.

The purchaser from an authorized dealer receives a receipt from the dealer which may be in a form prepared by Pekao for the dealer's use or may be his own form. The dealer then submits his order to Pekao on a List of Orders form, which, together with a written dealership agreement, constitutes the contract between Pekao and the dealer. The List of Orders form requires delivery of the purchased parcel to the recipient in Poland named in dealer's receipt form.

No parcel or commodity is shipped by the corporation from the United States. All of the materials necessary to make required deliveries is purchased by Pekao from Bank Polska Kasa Opieki, S. A., in Poland, under a contract pursuant to which the purchase price of the material includes delivery to the named recipient in Poland. The Bank is advised of what items to deliver, and to whom, through purchase manifests which are delivered periodically to it, and on delivery usually obtains a receipt. If a receipt is obtained, it is forwarded by Pekao to the direct purchaser or to the dealer from whom the order was received.

The contract with Pekao's customer is not completed until delivery is made in Poland.

In 1954 Pekao had 196 authorized dealers who submitted approximately $2,800,000 in orders. Of these, 54 dealers were located in New York and submitted approximately $630,000 in orders. Pekao itself sold approximately $635,000 worth of parcels, of which approximately $124,000 was ordered by persons in New York.

The activities of the corporation in New York are the receipt and acceptance of direct orders, receipt of payments for such orders, the making of contracts with dealers and the receipt of orders from dealers pursuant thereto, the receipt of payments for dealers' orders, preparation of purchase manifests, adjustment of claims and the placing of newspaper and radio advertising. All of its employees are employed in the New York office.

The corporation paid the New York State franchise tax for the years prior to 1954 under a covering letter stating that it did not admit that it was subject to the tax. The amounts involved in those years was, however, too small to warrant the expense of a review proceeding. In 1954, however, appellant did not pay a franchise tax but filed an Activities Report under Article 9A of the State Tax Law claiming exemption from the franchise tax. On December 14, 1956, the Commission assessed against petitioner the sum of $2,811.70 as a franchise tax. Thereafter, appellant sought review, claiming that it was engaged exclusively in foreign commerce and that hence the imposition of a privilege tax based upon such activities violated the Interstate Commerce Clause of the United States Constitution. By a decision dated June 5, 1958, the State Tax Commission determined that the activities of the taxpayer constituted the doing of business in New York so as to subject the appellant to the tax imposed under Article 9A of the Tax Law. This determination may be found on page 40 of the record.

Thereafter, appellant filed a petition dated August 19, 1958, with the Supreme Court of the State of New

York, Albany County, for judicial review of the said determination of the State Tax Commission. The issue of whether the application of the tax to appellant violated the Interstate Commerce Clause of the United States Constitution was raised in said petition as can be seen from the following quoted paragraph of the aforesaid petition, which petition appears on page 5 of the record:

> "Tenth: (c) Petitioner's business constitutes foreign commerce within the meaning of the United States Constitution and under the prohibition of the Constitution may not be taxed by the State of New York."

Pursuant to Section 1296 of the Civil Practice Act of the State of New York, the said Supreme Court, by order dated September 12, 1958, transferred the proceeding to the Appellate Division of the Supreme Court, Third Judicial Department, which latter court, by a memorandum opinion, affirmed the determination of the State Tax Commission and held that the activities of the appellant were not shown to be exclusively in foreign commerce. The opinion of this Court may be found in the appendix hereto as Appendix B.

The decision of the Appellate Division was appealed to the New York Court of Appeals as a matter of right on constitutional grounds and the said Court affirmed without opinion. Two Judges of the Court of Appeals dissented and voted to reverse based upon the ground that the transactions taxed were indivisibly involved in foreign commerce. The decision of this Court and the opinion of the dissenting Judges can be found in the appendix hereto as Appendix A.

The Questions Presented Are Substantial

The activities of the appellant corporation in New York are quite naturally substantial, since it is the only office, in fact, that the corporation has. The significant

fact with regard to appellant's activities is that the goods which are the subject of its business are not shipped from the United States to Poland. They originate in Poland, are stockpiled there, and delivered to the ultimate recipient in Poland. Without the final delivery of those goods, appellant has not completed its contract with its customers and, if it does not deliver those goods, it has no business. There is nothing separable in its activities in New York from the ultimate delivery of the goods in Poland.

The New York tax is clearly a privilege tax. In fact, it so classifies itself. The statute starts out as follows: "For the privilege of exercising its franchise or doing business in this state * * *." Since it is a privilege tax, it may not be imposed upon a corporation for the privilege of engaging in interstate or foreign commerce. *Spector Motor Service Inc.* v. *O'Connor*, 340 U. S. 602.

This principle was only recently reiterated by this Court in *Northwestern States Portland Cement Company* v. *Minnesota*, 358 U. S. 450, while upholding a direct income tax by the State of Minnesota against a corporation engaged exclusively in interstate commerce.

The Commerce Clause covers both interstate and foreign commerce—so no distinction can be drawn on the ground that appellant's activities involve foreign rather than interstate commerce.

> *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 425.

A privilege tax may only be imposed on a corporation engaged in interstate and foreign commerce if its local activities are clearly separable from the stream of foreign or interstate commerce.

> *United Piece Dye Works* v. *Joseph*, 282 App. Div. 60, aff'd W. O. 307 N. Y. 780, cert. denied, 348 U. S. 916;

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U. S. 157, 166;
Joseph v. *Carter & Weekes Co., supra.*

No case with identical facts has been found, but the parallel between the facts in the instant case and the decisions of this Court are so close as to constitute those decisions as authority.

Whether analyzed as to specific items of local activity or compared generally with other leading decisions, the conclusion is that Pekao's local activity approximates that of the cases which have held the tax in question invalid.

Thus, the fact that appellant is qualified to do business in New York is not a sufficient basis for tax.

Ozark Pipe Line v. *Monier*, 266 U. S. 555.

The solicitation of interstate (or foreign) commerce may not be carved out from the integral economic process of the commerce to be used as the taxable local incident.

Memphis Steam Laundry v. *Stone*, 342 U. S. 389.

Nor can it be argued that a distinction can be made because it involved services to be performed outside the State, for Pekao solicits orders for commodities to be delivered in foreign commerce from outside the State to persons outside the State.

Similarly, the fact that part of the commerce originates in New York and that the documents and funds move through New York do not furnish taxable local activity.

Railway Express Agency v. *Virginia*, 347 U. S. 359;
Spector Motor Service, Inc. v. *O'Connor, supra.*

In both the above cited cases the corporation engaged only in interstate commerce, as appellant here engages only

in foreign commerce, although each maintained terminals in the State, picked up freight in the State and performed such acts with respect to consolidation of shipments and truck maintenance as were required. The Court refused to permit a tax on the privilege of carrying on a business exclusively interstate in character.

Again in *Matter of United Piece Dye Works* v. *Joseph, supra*, the Court prohibited imposition of New York City gross receipts tax on substantial local activity because all of the activity was essential to the interstate commerce carried on.

Appellant's contention that the franchise tax cannot be validly assessed against it is additionally substantiated by *Joseph* v. *Carter & Weekes Co., supra*, where all of the corporation's activity took place in New York City. That activity was, however, an integral part of foreign commerce. That case involved the New York City gross receipts tax, which, like the franchise tax, is a privilege tax. The business of the corporation consisted of loading and unloading vessels wholly within the territorial limits of New York City. All of the vessels involved moved in interstate and foreign commerce without a call at any other port in New York. The Court, after first holding that it need not consider separately the question of interstate or foreign commerce since the Commerce Clause covers both, went on to state that the loading and the unloading could not be considered so distinct from commerce as to permit a tax.

The Appellate Division of the State of New York, in its opinion supporting the imposition of the tax on the appellant, cited four cases, each of which it is submitted is distinguishable from the case at bar. The first of those cases is *Berkshire Spinning Association* v. *City of New York*, 5 N. Y. (2d) 347; appeal dismissed 361 U. S. 3. In that case, the plaintiff was a Massachusetts corporation with its principal executive office in Providence, Rhode Island. It was engaged in manufacturing textile fabrics

and curtains in factories outside of New York State. It maintained two separate offices in New York City. The Court found that the vice-president in charge of the New York offices was not only in charge of selling all of plaintiff's finished goods, but supervised a department which created designs and purchased designs for fabrics. He also gave directions to the home office as to colors and the amounts of various dyeings. Also in response to discovered demands of the market, he instructed the factories as to the type of fabrics that the New York office wished to be made. Presumably also the finished goods were shipped into New York to fill customers' orders even though such shipments were made F. O. B. Rhode Island. As the New York Court of Appeals stated in the *Berkshire* case (p. 358):

> "There are 'separable local' incidents consisting of important services before and after the sale and shipment of the goods."

Those separable local incidents are not present in the case at bar, where all of appellant's activities are solely for the purpose of having goods delivered from stocks in Poland to persons in Poland.

The second decision cited by the Appellate Division is the *Matter of New Yorker Magazine* v. *Gerosa*, 3 N. Y. (2d) 362. Appeal dismissed 356 U. S. 339.

The New Yorker Magazine publishes a magazine in both a local and a national edition. It solicited advertising through both its New York and Chicago branch office. The magazine is managed, edited and compiled in New York City but printed in Connecticut under a contract with an independent printer. New York City circulation is 20% of the total and only that part of the circulation receipts was taxed. The completed magazine is mailed or shipped from Connecticut on instructions from the circulation department. The Court upheld imposition of a

gross receipts tax on appellant's total receipts from advertising less the advertising receipts from the Chicago branch office holding the tax to be on the New York sale of the magazine's advertising. In so holding, the Court relied on the decision in *Western Livestock* v. *Bureau of Internal Revenue*, 303 U. S. 250, which held that: "the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce."

The third case relied on by the Appellate Division was *Norton Co.* v. *Department of Revenue*, 340 U. S. 534. That case involved a privilege tax on selling tangible personal property in Illinois as opposed to a tax on the privilege of doing business as in the case at bar. The Norton Co. was a Massachusetts corporation which maintained an over-the-counter retail store in Illinois. It involved four distinct types of sales: (a) over-the-counter retail sales from local stock, (b) sales of goods ordered through the Illinois store but delivered directly from Massachusets to the Illinois buyers; (c) sales of goods not carried in Illinois stock but shipped into Illinois to fill orders sent direct to Massachusetts by Illinois customers; and (d) sales of goods not carried in stock in Illinois but sent and delivered through the Illinois store. Classes (a), (b) and (d) were held subject to the tax, while class (c) was held exempt. With regard to those classes of sales held subject to the tax, the Court stated that the local incidents which justified the tax were the maintenance in Illinois of the local store and the services it rendered in bringing about or completing those sales.

The last case cited by the Appellate Division was *Field Enterprises* v. *State of Washington*, 352 U. S. 806. Field was a Delaware corporation which maintained a divisional office in Seattle, staffed by two managers, clerks and bookkeepers. The Seattle district controlled operations in several States and employed a large number of salesmen, many of whom worked full time in the State of Washington.

The sales were of sets of education books, the stocks of which, except for necessary samples, were maintained outside of Washington. Here, however, the solicitation of the sale, the sale and the delivery were made in the State of Washington.

It is submitted that a substantial distinction exists between the above cases cited by the Appellate Division and the appellant's situation. For example, in each of the above cases, besides other factors, orders were solicited and the goods delivered in the State or jurisdiction imposing the tax. In the appellant's situation, the subject of the commerce is required to be delivered to a person in Poland. There is no completed contract unless such delivery is made and all of appellant's activity in New York is solely for the purpose of producing the result that the parcel be so delivered; the money it collects and pays out and the adjustments it makes, all relate to that end. There is no completed local transaction resulting from any of appellant's New York activities.

Thus, in view of the fact that no case has been found which contains a fact pattern identical to that in the case at bar, appellant believes that this case raises substantial federal questions so as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Appellant has appealed to this Court as a matter of right under 28 U. S. C. Sec. 1257(2). In the leading case of *Dahnke-Walker Co.* v. *Bondurant, supra,* at page 290, the Court said:

> "Our conclusion on the jurisdictional question is that as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the constitution and void, the case is rightly here on writ of error."

In *Fiske* v. *Kansas, supra,* at page 395, the Court said:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the federal constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error * * *. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented."

Here, it is appellant's contention that by respondents' determination that appellant is engaged in business in New York and hence subject to the tax imposed by Section 209(1) of the Tax Law, respondents have applied and enforced a statute, valid on its face, in an unconstitutional manner, and therefore appeal lies as a matter of right.

CONCLUSION

Wherefore, it is respectfully submitted that this Court has jurisdiction of this appeal under 28 U. S. C. Section 1257(2).

Respectfully submitted,

ARTHUR C. FINK,
Attorney for Appellant.

APPENDIX A

Court of Appeals Decision

Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered September 17, 1959, in a proceeding under section 215 of the Tax Law and article 78 of the Civil Practice Act (transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Albany County) which unanimously confirmed a determination of respondents assessing a franchise tax on petitioner-appellant under article 9-A of the Tax Law for the year 1954. Petitioner was a Delaware corporation authorized to do business in New York. It maintained an office with 82 employees at 25 Broad Street in the City of New York. Meetings of its directors and stockholders were held in its office in New York. It was engaged in the business of selling gift parcels to persons in the United States for delivery to persons in Poland. Stocks of the merchandise sold were located in Poland. Orders for gift parcels, wherever solicited and obtained, were accepted only in New York. Sales were made directly to customers or through authorized dealers. Final delivery to the recipient in Poland was arranged by petitioner through a Polish bank, which received the necessary documents and purchased the merchandise. Petitioner, in 1954, had 196 authorized dealers, 54 of these in New York. Of total orders of $2,800,000, orders from the New York dealers totaled $630,000. Petitioner filled directly a total of $635,000 in orders, $124,000 of which were to persons residing in New York. All moneys were accepted in New York and all claims were adjusted and paid in New York. Purchase manifests for transmittal to the Polish bank were prepared in New York. Dealership contracts were executed in New York and all advertising was placed in New York. Subdivision 1 of section 209 of the Tax Law provided that

every domestic or foreign corporation must pay annually a franchise tax "For the privilege of exercising its franchise or doing business in this state". In the Court of Appeals respondents argued that petitioner was doing sufficient local business in New York to subject it to the franchise tax.

Arthur C. Fink for appellant.

Louis J. Lefkowitz, Attorney-General (*Jean R. McCoy* and *Paxton Blair* of counsel), for respondents.

Order affirmed, with costs; no opinion.

Concur: Chief Judge Desmond and Judges Dye, Froessel, Burke and Foster. Judges Fuld and Van Voorhis dissent and vote to reverse and to grant the relief demanded by appellant upon the ground that the transactions which have been taxed are indivisibly involved in foreign commerce.

APPENDIX B

Memorandum of Decision by Appellate Division

Proceeding pursuant to section 215 of the Tax Law and Article 78 of the Civil Practice Act to review a determination of the State Tax Commission.

The petitioner Pekao Trading Corporation is engaged in the business of soliciting orders for gift parcels to be delivered in Poland and in executing those orders. This is accomplished by direction given by the petitioner to correspondents in Poland to fill orders from material in Poland and by transmitting necessary credits to the correspondents to effect this process. The State Tax Commission has assessed a franchise tax against petitioner under Tax Law, Article 9-A. The Commission argues that petitioner is not engaged in interstate or foreign commerce; but we are of opinion that the form of business carried on is essentially foreign commerce which is not a term limited merely to the physical shipment of goods. (Cf. *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533; *United States* v. *Shubert*, 348 U. S. 222).

But the activity of the petitioner is not shown in the record to be entirely foreign commerce; it is substantially engaged in such local business activity in New York as to justify the imposition of a franchise tax which is levied against a privilege. Petitioner maintains an office in New York and all its 32 employees are employed in New York; orders for shipments are received only in the New York office. It has dealers also in other states; but a substantial part of its business arises from solicitation by dealers or agents in New York from its New York office.

Of total orders from dealers of $2,800,000 in 1954, $630,000 were from New York dealers, and of a total of

$600,000 orders received directly by petitioner, $124,000 were received from persons in New York. It conducts substantial advertising and promotional activities in New York. We think the assessment valid. (*Berkshire Fine Spinning Associates, Inc.* v. *City of New York*, 5 N. Y. 2d 347; *Matter of New York Mag.* v. *Gerosa*, 3 N. Y. 2d 362; *Norton Co.* v. *Dept. of Revenue*, 340 U. S. 534; *Field Enterprises* v. *State of Washington*, 352 U. S. 806).

Determination unanimously confirmed with $50 costs.

Present—Bergan, Justice Presiding, Coon, Gibson, Herlihy and Reynolds, JJ.

APPENDIX C

Order

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Albany, in the City of Albany, on the 7th day of July, 1960.

Present:

HON. ISADORE BOOKSTEIN,
Justice.

ORDER FOR ORDER ON REMITTITUR

In the Matter of the Application of

PEKAO TRADING CORPORATION,

Petitioner-Appellant,

against

GEORGE M. BRAGALINI, IRA J. KALESTIN and FREDERICK R. CLARK, constituting the State Tax Commission of the State of New York,

Respondents-Respondents,

Pursuant to Section 215 of the Tax Law and Article 78 of the Civil Practice Act.

The above mentioned Pekao Trading Corporation having appealed to the Court of Appeals from the order of the Appellate Division of this Court, Third Department, entered on the 25th day of September, 1959, in the office of the Clerk of the County of Albany, and the Court of Appeals having heard said appeal and ordered and

adjudged that the order so appealed from be affirmed, with costs, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of Albany County,

Now, on motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the respondents, it is

ORDERED that the said order of the Court of Appeals be, and the same hereby is, made the order of this Court; and that the order entered herein on the 25th day of September, 1959, be, and the same hereby is, affirmed, and that an order of this Court be entered herein affirming said order with costs of said appeal to be taxed against the petitioner Pekao Trading Corporation.

Enter:

I. B.,

Justice.